Supreme Court
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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

In the decision below, the Eleventh Circuit correctly held that Title IX contains no implied private right of action for retaliation. Title IX contains no express private remedy of any kind and, there is no indication that Congress intended to create an implied private remedy for retaliation. The template for analysis of this issue is set forth in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), which held that Congressional intent is the key to implied private rights and remedies and that this intent can generally be ascertained solely from the text and structure of the statute. Title IX contains no reference to retaliation, which precludes any implied private remedy for retaliation.

The Eleventh Circuit also correctly held that administrative regulations cannot create an implied private remedy that Congress did not intend to create. Thus, 34 C.F.R. § 100.7(e) is not sufficient to create a private remedy for retaliation here.

The Petitioner's claim also fails because the Petitioner is not within the class of intended beneficiaries of Title IX, which is limited to persons discriminated against on the basis of sex with respect to federally funded educational programs.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY HELD THAT THERE IS NO IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

The sole question before this Court is whether Title IX of The Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.* ("Title IX"), contains an implied private right of action for retaliation.[1] Specifically, this Court must determine whether such a private action exists, and if so, whether that right extends to one who was not a direct victim of gender discrimination. In response to this question, the Eleventh Circuit has correctly held that no such implied private right of action exists because the statute does not expressly prohibit retaliation, and because there was no Congressional intent to create such an implied right. Furthermore, the Eleventh Circuit was also correct in holding that the administrative regulations at issue could not create a remedy that Congress itself did not intend to create.

The Petitioner was a teacher employed by the Respondent as a physical education teacher and girls' basketball coach. During the 2000-01 school year he complained that the girls' basketball team received unequal funding and access to facilities, as compared to the boys' team. He alleges that he began receiving negative performance evaluations as a result of his complaints and that he was eventually relieved of his paid coaching duties, although he remained employed as a

1. Section 901 of Title IX is the principal statute at issue and it provides in pertinent part that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681.

teacher.[2] Since there is no express private remedy under Title IX, the Petitioner can prevail only if he can establish a valid implied private remedy for retaliation. The template for analysis of implied rights and remedies is set forth in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), which held that Congressional intent is the key to implied private rights and remedies and that this intent can generally be ascertained solely from the text and structure of the statute. *Sandoval* is dispositive of the instant case because its analysis shows that there was no Congressional intent to create an implied remedy for retaliation under Title IX.

A. *Sandoval* Is Dispositive and Establishes That Congress Did Not Intend to Create an Implied Private Right Against Retaliation

The Petitioner can recover under Title IX only if he can somehow establish Congressional intent to create an implied private right of action against retaliation. It is undisputed that Title IX does not create an express private right of action or private remedy of any kind. An implied private right of action for direct discrimination was recognized by this Court in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717, 99 S. Ct. 1946, 1968 (1979). This implied remedy was later extended to include monetary damage remedies in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77, 112 S. Ct. 1028, 1039, (1992). This Court has not, however, similarly extended the

2. The Respondent argued below that the allegedly adverse employment actions did not rise to the level necessary to constitute actionable retaliation, but, because this case was decided on a motion to dismiss, the Eleventh Circuit assumed, arguendo, that the Respondent retaliated against the Petitioner for complaining about perceived violations of Title IX. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002).

statute to create an implied remedy for retaliation against one who is not a direct victim of gender discrimination. To support his request for relief, the Petitioner claims that this implied right of action for retaliation arises under §§ 901 and 902 of Title IX and 34 C.F.R. § 100.7(e). For the reasons set forth below, this claim may not stand.

The Court should decline the Petitioner's invitation to expand private remedies because *Sandoval* is dispositive here, and it dictates tha Title IX contains no implied private right of action for retaliation. Specifically, *Sandoval* held that there was no implied private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000d, 2000d-1.[3] Section 601 of Title VI, which is parallel to § 901 of Title IX, prohibits discrimination on the basis of race and national origin in federally funded programs. Section 601 had previously been interpreted as limited to intentional discrimination, but regulations issued under § 602 purported to prohibit disparate impact discrimination. *Sandoval* held that administrative regulations (i) could not expan d the scope of the statutory prohibition, (ii) could not create a right or remedy that Congress had not intended to create, and (iii) could not prohibit acts (disparate impact discrimination) permitted by the statute. *Sandoval*, 532 U.S. at 284-91, 121 S. Ct. at 1518-22.

By analogy, *Sandoval* established that Title IX, the statutory twin of Title VI, did not create an implied private right of action that exceeds the scope of the express statutory

3. Title VI was found to be the model for Title IX, *Sandoval*, 532 U.S. at 280, 121 S. Ct. at 1516. *See Cannon*, 441 U.S. at 704, 99 S. Ct. at 1961.

right. *Sandoval* held that legislative intent is the *only* proper basis to infer a private right of action. This Court explained:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Sandoval, 532 U.S. at 286-87, 121 S. Ct. at 1519-1520.

This Court further explained that the sources for determining legislative intent are normally limited to the text of the statute and the statutory structure. *Sandoval*, 532 U.S. at 287-88, 121 S. Ct. at 1520-21. Here, Title IX dictates that there is no implied remedy for retaliation because retaliation is not mentioned in the text of the statute and cannot be fairly inferred from the text. Reinforcing that conclusion is the fact that Title IX identifies the class for whose benefit the statute was enacted. This class is limited to those individuals subjected to *direct gender discrimination*. (emphasis added). Nowhere in the text of the statute is there even a hint that alleged victims of retaliation, such as the Petitioner, are also protected. The statutory structure of Title IX also militates against further expansion of private rights of action because it already contains an express administrative remedy. This suggests that Congress intended to preclude other remedies.

In the decision below, the Eleventh Circuit followed the lead of *Sandoval* to find that it could rely exclusively on the text and structure of Title IX to reject the Petitioner's claim for an implied right of action for retaliation by one who is not a direct victim of gender discrimination. *Jackson*, 309 F.3d at 1345-46. The Eleventh Circuit concluded that secondary sources of legislative intent were not necessary because Congressional intent is clear from the text and structure of Title IX.

B. Congress Did Not Intend To Create An Implied Private Right of Action for Retaliation Under Title IX

1. The Text of § 901 Belies Any Intent to Create An Implied Private Right of Action For Retaliation

The analysis in this case can also begin and end with the text of the statute. Section 901, the only section that creates any private rights, does not prohibit retaliation for opposing gender discrimination. Section 901 provides, in pertinent part that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). Clearly, this section says nothing about retaliation. Instead it applies only to persons who are discriminated against on the basis of sex. The Petitioner was not discriminated against on the basis of sex, nor does he claim that he was.[4] Petition at 3; 9 n.1; *Jackson*, 309 F.3d at 1335.

4. That fact distinguishes this case from most of the cases cited by the Petitioner where a student claims both direct discrimination and retaliation for complaining about the original discrimination. *See infra*, footnote 7.

Rather, his sole claim is that he was subjected to retaliation for complaining about alleged discrimination against members of the girls' basketball team.

Because Congressional intent is the only permissible basis for creating implied private rights, the definition of rights covered in § 901 is of paramount importance. Although this Court has interpreted § 901 to include implied rights and remedies, it has been careful not to extend the scope of those rights beyond the discrimination prohibited in the text of the statute. The Court has not gone far afield to create additional rights or additional classes of beneficiaries not described in the statute itself. This Court has held that the definition of discrimination is broad enough to encompass sexual harassment, but only to the extent that sexual harassment discriminates against individuals, or excludes them from participation on the basis of sex. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S. Ct. 1028 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999). This Court noted in *Davis* that

> The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. . . . It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines

> and detracts from the victims' educational experience, that the victim-students are **effectively denied equal access** to an institution's resources and opportunities.

Davis, 526 U.S. at 650-51, 119 S. Ct. at 1675 (emphasis added). The care which this Court took in *Davis* to cast sexual harassment as just another form of gender discrimination, clearly shows that any implied private right must still fit within the terms of the statute. Therefore, *Davis* dictates a cautious approach to implied rights and does not justify judicial creation of the broad right against retaliation sought by the Petitioner. A broad prohibition against retaliation would exceed the scope of the statute and result in judicial creation of a right that Congress did not intend. The role of the judiciary is to interpret the rights which Congress intended to create, not to create new rights. This is the case no matter how desirable the result or how consistent with the policy goals of the statute.[5]

As noted by the Eleventh Circuit in the decision below, the text of § 901 does not prohibit retaliation or imply any such prohibition. Therefore, the Eleventh Circuit refused to create a new right and construed its task as merely,

> to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of

5. *Gebser* also noted that the quasi-contractual nature of Title IX militates against private damage remedies unless the fund recipient had actual notice of the harassment and failed to respond reasonably. *Id.*, 524 U.S. at 287, 118 S. Ct. at 1998. Similarly, that factor militates against expansion to cover retaliation that is not expressly prohibited by the text of the statute.

> retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct.

Jackson, 309 F.3d at 1344-45. This conclusion is reinforced by the contrast between Title IX and Title VII, which contains an express prohibition against retaliation. 42 U.S.C. § 2000e-3(a). Clearly Congress knew how to prohibit retaliation when it so chose, militating against an implied prohibition.[6] It may be safely assumed, therefore, that Congress chose not to create a similar prohibition against retaliation in Title IX.

2. The Structure of Title IX and the Existence of an Express Administrative Remedy Militate Against an Implied Private Remedy

The structure of Title IX also weighs against an implied remedy for retaliation. That is, the statute already contains an express administrative remedy. The Department of Education may enforce the provisions of Title IX through an administrative process that culminates in a complete denial of federal funds to an entity in violation of Title IX. This structure suggests that Congress – by providing an express remedy – meant to preclude other remedies not specifically listed. Even though some implied remedies have been recognized, the structure of Title IX and its express administrative remedies caution against any further expansion of implied remedies.

6. Unlike "sexual harassment," "retaliation" is not a subset of discrimination, a point made clear by the fact that Title VII contains specific language defining discrimination to include retaliation. No such language exists in Title IX.

In sum, the text of § 901 and the structure of Title IX clearly establish that Congress did not intend to create a private right of action for retaliation. The *Sandoval* analysis compels the conclusion that no basis exists for the courts to create an implied right of action for retaliation, and the decision below is correct.

3. *Peters v. Jenney* Was Incorrectly Decided and Does Not Support the Existence of an Implied Remedy For Retaliation

The Petitioner cites to a recent Fourth Circuit case, *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), for the proposition that there is an implied right against retaliation.[7]

7. Despite suggestions of "near-consensus in the federal circuit courts," there are really only three cases – this case, *Peters*, and *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), a Fifth Circuit decision prior to *Sandoval* – that have squarely addressed whether Title IX created an implied private right of action for retaliation against someone other than the victim of gender discrimination. The other cases cited by the Petitioner are of marginal relevance because they contain no detailed analysis to support an implied right of action and because they ultimately reject the retaliation claims at issue.

Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 251 (2d Cir. 1995) was decided prior to *Sandoval* and involved a retaliation claim by a dental student who also claimed to be a direct victim of sexual harassment. The opinion assumed that there was a cognizable claim for retaliation, but did not cite any authority for that position, or perform any analysis on the threshold question. It affirmed a dismissal of all claims, including direct discrimination and retaliation.

Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67 (1st Cir. 2002), also involved a student who asserted claims for direct discrimination (Cont'd)

Peters, which was a Title VI case, does not establish such an implied right, paid only lip service to the *Sandoval* analysis. *Peters* did not deeply analyze whether Congress intended to create an implied right against retaliation, but focused primarily on 34 C.F.R. § 100.7(e) as an interpretative regulation that somehow defined "retaliation" as an implicit component of prohibited discrimination. As will be discussed below, that regulation is not an interpretative regulation and cannot validly expand the scope of the statute. *Peters* also relied heavily on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), for the proposition that retaliation is implicit in civil rights statutes.[8] Significantly, *Peters* was decided after the Eleventh Circuit's opinion in this case, but the majority opinion discusses *Jackson* only in a single footnote. *Peters*, 327 F.3d at 318, n.10. The dissent in *Peters* does, however, discuss *Jackson* in detail and concludes that the Eleventh Circuit was correct in rejecting an implied right of action for retaliation. *Peters*, 327 F.3d at 324-28 (dissent).

The Petitioner seeks to limit *Sandoval* to disparate impact cases, Petition at 10, but fails to acknowledge its more fundamental holdings that (i) the intent of Congress is the

(Cont'd)
and retaliation. That court assumed, also without analysis or citation to authority, that a Title IX retaliation claim involved the same elements as a Title VII retaliation claim. This opinion ultimately affirmed dismissal on the basis that the complaint did not allege facts sufficient to support either the retaliation claim under Title IX or the direct discrimination claim.

8. As discussed in Section I.C. below, *Sullivan* does not establish that there is a generalized implied right to be free of retaliation under Title IX.

primary desideratum for analyzing implied rights and remedies and (ii) the federal courts should be reluctant to speak where Congress has been silent. *Sandoval*, 532 U.S. at 287-91, 121 S. Ct. at 1520-22. The Petitioner, however, sees the central focus of *Sandoval* as being the effect of authoritative interpretative regulations. Petition at 11. This is incorrect, because, as this Court held in *Sandoval*, such regulations may interpret a statute, but cannot create rights which Congress did not create. As this Court stated in *Sandoval*, "we have found no evidence anywhere in the text [of § 602] to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522.

C. A Prohibition Against Retaliation is Not Implicit in Civil Rights Statutes Generally

The Petitioner argues that he is entitled to an implied private remedy because anti-retaliation is implicit in civil rights statutes. Petition at 12-15. This argument fails because it does not give effect to Congressional intent or to this Court's current approach to the creation of implied private rights of action. The Petitioner relies principally on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), for this argument, but his argument fails.

Sullivan allowed a private cause of action for retaliation under 42 U.S.C. § 1982. The Petitioner claims that *Sullivan* establishes that anti-retaliation prohibitions are generally included by implication in civil rights statutes. However, *Sullivan* is not able to bear the load that Petitioner places on it. First, the argument from *Sullivan*, as advanced by the Petitioner, conflicts with *Sandoval*, which made clear that implied rights and remedies can be recognized only if Congress so intended. *Sandoval* specifically noted that the

previous, liberal understanding of private rights of action was abandoned in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975). *Sandoval*, 532 U.S. at 287, 121 S. Ct. at 1520. Thus, cases under the "*ancien regime*" have been abandoned and should be approached with caution to the extent that they conflict with *Sandoval* and *Cort v. Ash Sullivan* has not been overruled, but *Sandoval* requires that it be limited to its facts.[9] Second, *Sullivan* is distinguishable from this case because the plaintiff there did more than merely complain about discrimination that happened to others. He was a party to a lease transaction that was subject to illegal discrimination. *Sullivan*, 396 U.S. at 235, 90 S. Ct. at 403. Although he was himself a white man, his attempted lease of property to a black man lead to his expulsion from the neighborhood board. *Id.* Arguably, he fell within the class of intended beneficiaries of a statute that granted to all citizens the same rights to transact property "as is enjoyed by white citizens." *Sullivan*, 396 U.S. at 235, 90 S. Ct. at 404. In contrast, the Petitioner here did not himself suffer any direct discrimination or exclusion on the basis of sex. Rather, his only claim is that he was retaliated against for complaining about perceived discrimination against others. Thus, *Sullivan* is distinguishable on its facts and does not support an implied right of action for retaliation under Title IX.

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9. It is not clear to what extent *Sullivan* survived *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), which held that 42 U.S.C. § 1981 covered only discrimination in the making and enforcement of contracts and not racial harassment during the employment relationship. *Patterson* was overruled by statute, but this Court later held that the amendment was not retroactive, implicitly rejecting arguments that § 1981 should have been broadly construed from the outset. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510 (1994). Neither *Patterson* nor *Rivers* discussed *Sullivan*, but their holdings caution against an expansive reading of that case.

D. *Sandoval* Establishes that an Administrative Regulation May Not Create a Federal Right Unless Such a Right is Expressly Created by the Governing Statute

The Petitioner also claims that administrative regulations create a right to be free from retaliation. Petition at 16-21. That is not correct and, in fact, is contrary to the holding of *Sandoval*. Although administrative regulations can interpret ambiguous statutes or fill in the gaps, they cannot create rights that Congress did not intend to create. *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522. To be certain, § 902, which authorized administrative regulations under Title IX, does not create additional rights, as evidenced by the Eleventh Circuit's application of *Sandoval*. Significantly, the Eleventh Circuit held that § 902 neither prohibited retaliation, nor authorized administrative regulations that prohibit retaliation. The Eleventh Circuit noted that:

> Section 902, like its twin § 602, is devoid of "rights-creating" language of any kind – whether against gender discrimination, retaliation, or any other kind of harm. Instead, again like § 602, it explicitly directs and authorizes *federal agencies* to regulate recipients of federal funding to effectuate the anti-discrimination provisions of § 901. As detailed above, *see supra* at 1336- 37, it provides an enforcement mechanism – the cessation of federal funding – and imposes "elaborate restrictions on agency enforcement." *Sandoval*, 532 U.S. at 290, 121 S. Ct. at 1521. . . . That § 902 is thus concerned exclusively with the power of federal agencies to regulate recipients of federal funds renders its focus, like § 602's, "twice removed" from any consideration of what harm Title IX is meant to remedy. *Sandoval*, 532 U.S. at 289, 121 S. Ct. at 1521. Section 902 plainly does not disclose any congressional intent to imply a private right of action of any kind, let alone against retaliation.

Jackson, 309 F.3d at 1345.

Thus, the anti-retaliation provision proposed by the Petitioner is not twice, but thrice, removed from the rights created under § 901. The regulations do not focus on the victim, or the funding recipient, or even the administrative agency issuing the regulations. Instead, § 902 focuses solely on the enforcement of the statute and does not create additional rights or authorize administrative regulations to create additional rights. As it stands, the connection between the regulations and implied rights is simply too attenuated to support any private damage remedy under Title IX.

The text of § 902 should conclusively establish that it does not authorize regulations which attempt to create any private remedies, for retaliation or anything else. If, however, there is any doubt on that point, *Sandoval* holds that such a regulation *cannot* create a private right of action that Congress did not. *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522. As this Court stated in *Sandoval*, it is "incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* This holding is consistent with *Gebser*, in which this Court held that there was no private right of action for violation of a Department of Education regulation requiring schools to adopt and publish sexual harassment policies and

grievance procedures. *Gebser*, 524 U.S. at 292, 118 S. Ct. at 2000. This Court concluded in *Gebser* that "[w]e have never held . . . that the implied right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements." *Id.*

Thus, regulations alone cannot support a private right of action. They are relevant only to the extent that they *interpret* the statute by defining and clarifying both permissible and prohibited conduct under the same. The source of any right remains properly rooted in the statute itself, and not in the administrative regulations that interpret it. Accordingly, *Sandoval* declared that the disparate impact regulations under § 602 went beyond what Congress expressly created in § 601 and attempted instead to create new rights. The text of § 601 does *not* prohibit disparate impact discrimination while the regulations under § 602 purport to do just that. Thus, this Court reasoned in *Sandoval* that administrative regulations cannot support private causes of action to prohibit the very conduct that the governing statute permits. The reach of administrative regulations cannot exceed the scope of the statute.

Similarly, the administrative regulations at issue here, 34 C.F.R. § 100.7(e), cannot create a private right against retaliation. The statute does not prohibit, or even address, retaliation against one who is not a direct victim of discrimination on the basis of sex. Like disparate impact discrimination in *Sandoval*, retaliation is not prohibited by the statute and is therefore permitted. Accordingly, administrative regulations can neither prohibit retaliation nor create a right that Congress did not create.

Nor can a right against retaliation arise from a claim that 34 C.F.R. § 100.7(e) is an "authoritative interpretation of the statute" that is entitled to deference under *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 2781-82 (1984). By its language and structure, the regulation does not purport to define terms, fill gaps or clarify ambiguities. Instead, it seeks only to provide a procedure for investigations by the Department of Education. It provides:

> (e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

34 C.F.R. § 100.7(e).

There is nothing in the language of this regulation to even suggest that it is defining or interpreting "discrimination" or other ambiguous terms contained in § 901.[10] To the extent that this regulation has any relevance

10. *See Sandoval*, 532 U.S. at 284-85, 121 S. Ct. at 1518-19, for a discussion of cases affirming "interpretative regulations." Almost all of those cases describe the regulations at issue as "defining (Cont'd)

outside the context of the Department of Education investigations, it purports to create a new right out of whole cloth, which is precluded by *Sandoval*.

The structure of this regulation ties it to the enforcement of the statute and not to any expansion of implied private rights. This regulation is contained in § 100.7, entitled "Conduct of Investigations." It relates entirely to the conduct of periodic compliance reviews and investigations by the Department of Education under § 902. Although the Court need not reach the issue, it appears that the anti-retaliation provision is limited to retaliation in connection with a Department of Education investigation, not retaliation for complaints in general.

The Petitioner also errs in attempting to buttress his expansive new implied right by reliance on legislative history, post-enactment history, and Congressional failure to disapprove of the regulations. Petition at 16-19. As this Court has already determined in *Sandoval*, legislative history is not helpful in determining whether there is a private right of action under Title VI and Title IX. *Sandoval*, 532 U.S. at 292, 121 S. Ct. at 1523. Similarly, the Petitioner cannot rely on an argument that Congressional failure to disapprove these administrative regulations somehow supports an implied private right. Congressional silence is weak even when Congress enacts amendments after a judicial interpretation. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-87, 114 S. Ct. 1439, 1453 (1994). The Petitioner's support here is even weaker because

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(Cont'd)
terms" or "clarifying" what was covered. In contrast, the regulations at issue here do not clarify or define anything, but purport to prohibit an action not covered by the statute.

all he can point to is Congressional failure to disapprove regulations. Moreover, Congressional failure to disapprove these regulations says nothing about whether Congress approved of an implied right of action for retaliation. The regulations were submitted for review in 1975, prior to the time that *Cannon* first recognized an implied private right of action and almost two decades before *Franklin* extended the implied right of action to include monetary damages. Thus, there is no evidence that Congress even thought about implied remedies in 1975 and the post-enactment legislative history is simply not relevant or instructive.

The Petitioner argues at length about why an anti-retaliation policy is consistent with the goals of Title IX and why this would constitute sound public policy. Petition at 15-19. Those arguments are foreclosed by *Sandoval* and are properly addressed to Congress, which has the power to prohibit retaliation if it so chooses. To the extent, however, that policy reasons are in any way relevant, it should be noted that an anti-retaliation policy is not cost free. A liberal anti-retaliation policy could easily serve to federalize educational policy disputes, especially those concerning the allocation of scarce resources. *See Peters*, 327 F.3d at 320, n.16 ("manifest desire not to tie the hands of employers in the objective selection and control of personnel"). Creating a new right against retaliation could usurp tenure laws and Title VII remedies and could alter the balance of employer-employee relations. Thus, bringing disputes about allocation of facilities and equipment into federal court under an anti-retaliation rubric would serve only to divert scarce resources away from the educational mission. *See Gebser*, 524 U.S. at 289, 118 S. Ct. at 1999.

Finally, affirmance of the decision below will not leave the goals of Title IX defenseless. The Department of Education retains its authority to investigate and remedy violations ranging from informal actions to a cutoff of all federal funds. Moreover, the students on the girls' basketball team have a right to file a suit under Title IX if they believe that the boys' teams have better facilities and equipment. Finally, the Petitioner can avail himself of any rights he has under state tenure laws and under 42 U.S.C. § 1983 if his First Amendment rights have been violated.

II. THE DECISION BELOW IS CORRECT BECAUSE THE PETITIONER IS NOT WITHIN THE CLASS OF INTENDED BENEFICIARIES

The Eleventh Circuit also held that, even if there is an implied private right of action for retaliation, the Petitioner is not within the class of intended beneficiaries. Section 901 identifies its beneficiaries as the class of persons subjected to discrimination or exclusion on the basis of gender. Nothing in the statute suggests that it also benefits others indirectly affected by discrimination, including parents, teachers, or coaches. Congress could have expanded the class of intended beneficiaries, but chose not to do so. Therefore, the judiciary is not free to expand the scope of the rights and remedies beyond what Congress intended. *See Gebser*, 524 U.S. at 289, 118 S. Ct. at 1999 ("anomalous to expand the plaintiff class for implied causes of action beyond the bounds of the express cause of action").

As the Eleventh Circuit concluded in the decision below, § 901 provides a private right of action to a limited class of identified victims of gender discrimination.

> Nowhere in the text, however is any mention made of individuals other than victims of gender discrimination. . . . We are not free to extend the scope of Title IX's protection beyond the boundaries Congress meant to establish, and we thus may not read Title IX so broadly as to cover anyone other than direct victims of gender discrimination.

Jackson, 309 F.3d at 1346-47. The Petitioner is not a member of the protected class because he has suffered no discrimination or exclusion on the basis of sex. Therefore, his retaliation claim must fail.[11]

CONCLUSION

As evident from the discussion above, as well as the decision below, the Eleventh Circuit correctly held that Title IX contains no implied private right of action for retaliation. The statute itself contains no express private remedy of any kind anywhere in its text. Absent evidence of Congressional intent to create such a remedy, this Court should not constrain to create the same. Consequently, the law in this matter is clear: inasmuch as Title IX contains no reference to retaliation, any implied private remedy for retaliation is, therefore, precluded.

This Court advanced the same clarity in its decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), wherein it held that Congressional intent is the key to implied private rights and remedies, and that this intent could only be ascertained from the text and structure of the statute.

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11. The dissent in *Peters* found the Petitioner to be "at least twice removed from the class of people sought to be protected by the statute."

The Eleventh Circuit merely adhered to this Court's reasoning from *Alexander v. Sandoval* in denying the Plaintiff's Title IX claims against the Board insofar as Title IX simply did not permit the type of relief the Plaintiff sought. Thus, as it relates to this Court and the Eleventh Circuit, there is no genuine split of authority on the issue of implied private rights and remedies under Title VI or Title IX, regardless of what the administrative regulations, or the Plaintiff, attempt to create.

In sum, this Court should deny the Petition for Certiorari because the Eleventh Circuit's decision was correct. The text and structure of Title IX clearly does not support an implied private right of action for retaliation.

Respectfully submitted,

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